In the Matter of Arbitration Between Fairchild Federal Employees Union and United States Air Force Fairchild Air Force Base Spokane, WA	DATE: Nov. 1 & 2, 2005 FMCS CASE #: 05-02873 GRIEVANT: A. Miller

BEFORE: David P. Beauvais, Arbitrator

APPEARANCES:

For the U. S. Air Force: Captain Brian McLain,

For the FFEU: Michael Sveska

PLACE OF HEARING: Fairchild AFB, Spokane, WA

AWARD: The grievance is denied in part and sustained in part. The nine-day suspension is reduced to an official letter of Reprimand for Failure to Be Candid in the Use of Sick Leave. The charge of Unauthorized Possession of Government Property will be stricken from the letter and the Grievant's record. The Grievant will be made whole for the lost time.

DATE OF AWARD: November 29, 2005

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Arbitrator

INTRODUCTION

This Arbitration proceeding arises pursuant to the 2003-2006 agreement between the U.S. Air Force, Fairchild Air Force Base (hereinafter the Agency or Employer) and the Fairchild Federal Employees Union, (hereinafter the FFEU or the Union). The undersigned was selected as Arbitrator in accordance with procedures set forth by the Federal Mediation and Conciliation Service. Pursuant to the parties' agreement in Article 11 of the CBA, the Arbitrator's decision is final and binding.

The hearing was conducted on November 1 and 2, 2005, at Fairchild Air Force Base, Spokane Washington. The hearing commenced at 9:00 a.m. on November 1, and concluded at 11:30 a.m. on November 2, 2005. The hearing proceeded in an orderly manner. There was a full opportunity for the parties to submit evidence, and to examine and cross-examine witnesses. All witnesses testified under oath. The parties submitted a joint document containing information and argument from the various steps of the grievance procedure. The Agency submitted one three-page document into evidence. These documents were received and made part of the record.

The advocates fully and fairly represented their respective parties. Captain Brian McLain represented the U. S. Air Force. Michael Sveska represented the FFEU. There were no challenges to the substantive or procedural arbitrability of the dispute. The parties submitted the matter on the basis of testimony and evidence presented at the hearing and through argument set forth in their respective post hearing briefs. It was agreed the briefs would be sent to the Arbitrator via email no later than November 18, 2005, and that the Arbitrator would render a decision within thirty days of the close of record. The Union's brief was received on November 10, 2005 and the Agency's brief was received on November 17, 2005 at which time the hearing record was closed. This opinion and award will serve as the arbitrator's final and binding decision in this dispute.

ISSUE

The parties stipulated to the following issue statement:

Was the nine-day suspension issued to the Grievant, Alan Miller, on July 12, 2005, for just cause? If not, what is the proper remedy?

BACKGROUND

The Grievant, Alan Miller (hereinafter the Grievant or Miller), is a Lead Firefighter employed in the 92nd Civil Engineer Squadron at Fairchild Air Force Base, which is located outside Spokane Washington. At the time of the incidents giving rise to this grievance the Grievant had approximately thirty-three years of service with the Agency. The Grievant's immediate supervisor was Division Chief Kimo Kuheana, who was also a civilian employee.

The Grievant received a Proposed Fourteen-Day Suspension on June 16, 2005. The charges contained in the notice were Unauthorized Possession of Government Property and Failure to be Candid in the Use of Sick Leave. The charges involve an incident on December 30, 2004.

On December 30, 2004, Division Chief Kuheana gave a briefing to the members of the A shift from fire station number one. As part of the briefing, Kuheana advised his employees that two video cards purchased for installation in the station's computers were missing.[1] Kuheana asked that the video cards be returned, and warned that the employee who took the cards would be "hammered" if they were found out.

Shortly thereafter, the Grievant approached Kuheana and Chief William Nowlin. The Grievant told them that he thought he knew where the missing video cards were, and led them to a small room known as the computer closet. However, neither of the missing video cards was found in that area. Shortly before 10:00 a.m. the Grievant notified Kuheana that his wife was ill

[1] It was undisputed that four Radeon 9800 Pro video cards were originally purchased for installation into fire station computers.

and that he needed to go home. Kuheana granted the Grievant sick leave on that basis. The Grievant left the fire station at approximately 10:00 a.m.

At approximately 3:30 p.m. the Grievant returned to the fire station. The Grievant handed Nowlin and Kuheana a Radeon 9800 pro box containing a video card, a plastic static bag, a software CD, and cable connectors. The Grievant advised Nowlin and Kuheana that he suspected someone had replaced the video card in his home computer with one of the missing Radeon 9800 Pro video cards. The Grievant explained that he had brought the computer to work for another employee, David Schaffer, to reformat.

The Grievant stated that he had purchased a replacement card and was "taking one for the team", meaning that he was turning in what he thought was one of the missing Radeon 9800 Pro video cards. Later that day the Grievant also retracted his statement that a fellow employee, David Shaffer, had seen other employees playing video games on his computer.

Chief Nowlin referred the matter to Air Force Security Police for investigation. According to the testimony of Detective Gary Rome, the request for the investigation was initially turned down because it was believed an offer of amnesty was implied in Kuheana's briefing. However, it was subsequently determined that an investigation was appropriate. Detective Rome was assigned to conduct the investigation, which mostly consisted of numerous interviews with fire station personnel, including the Grievant. As part of the investigation, Detective Rome checked each computer in the fire station for the missing video cards.

As a result of that check, it was determined that all four of the Radeon 9800 video cards were accounted for. One was installed in a computer in the Emergency Response Center (ERC), a second in the Fire Alarm Control Center (FACC), and two were still in boxes, one opened, the other sealed. It was further determined that the card the Grievant turned into Nowlin and Kuheana was a VCI 128 video card. According to Rome, Firefighter George Schumacher, the individual who installed the new Radeon 9800 cards, identified the VCI 128 card as one he had taken out of a fire station computer and placed in the Radeon 9800 Pro box.

On July 12, 2005, the deciding official, Chief William E. Nowlin issued a Notice of Decision on the fourteen (14) day suspension. In the decision, Chief Nowlin reduced the suspension to nine (9) calendar working days. In

reality, the Grievant lost five (5) days of work. Following receipt of the decision letter, the Grievant initiated a timely grievance. The grievance was subsequently appealed through the established steps of the grievance procedure. When the parties could not resolve the matter, it was scheduled for arbitration in accordance with Article eleven of the Collective Bargaining Agreement.

Analysis and Discussion

The Arbitrator has carefully reviewed the documentary evidence, relevant testimony of witnesses, and the parties post-hearing briefs. At the outset, two procedural issues must be addressed.

Level of Proof

This is a disciplinary grievance. Consequently, the Agency bears the burden of proof in this case. In their opening statement and closing brief, the Agency asserted that the level of proof in this case should be a preponderance of evidence. The Union did not address this issue in either their opening statement or closing brief.

Many arbitrators carve out an exception to the preponderance of evidence standard, requiring a higher level of proof, when the charge is criminal in nature. In the instant case, the Grievant is charged, in part, with a criminal act. In fact the investigative report identifies the offense as third degree theft and possessing stolen property. However, based on the citations offered by the Agency in their brief, the Arbitrator believes the appropriate level of proof in this case is the preponderance of evidence standard.

The Union's Standing Objection Regarding Access to Information

The Union presented a standing objection throughout the hearing regarding the alleged non-response by the Agency to the Union's request for information regarding the investigation of this matter. Specifically, the Union maintained that they requested, and should have had access to, copies of the actual written statements made by the principals in the course of the investigation. The Agency pointed out that there was no specific request for the individual statements. The Agency also maintained that they relied solely upon the investigative summary in making the disciplinary decision, and that the individual statements were therefore irrelevant.

The Arbitrator sustains the Union's objection for several reasons. First, although the Agency maintains that they used only the investigative summary, the statements themselves provide the best evidence as regards what each witness remembered at the time.

Second, the statements of each witness interviewed are listed as exhibits in the investigative summary. It is noted that a time and attendance sheet, dated January 8, 2005, and identified as exhibit 2 in the investigative summary was included as part of the moving papers (tab 6). Since the Agency apparently believed this particular exhibit was relevant, their argument that other exhibits included in the same investigative summary were not relevant is considerably weakened.

Third, although the Union's initial request for information may have been vague, they cured that problem by specifically arguing in their Step one grievance that they were entitled to the individual witness statements.

In summary, the Union was entitled to the individual statements. The Agency is advised that they should honor such requests in the future. However, in terms of impact on the case at bar, the Arbitrator finds that the withholding of the statements did not unduly prejudice the Union's ability to craft or present their case.

Unauthorized Possession of Government Property

Two alternative theories regarding the property in question, a VTI 128 video card, were advanced during the arbitration hearing. Additionally, the Union advanced a third theory in their closing brief. Parenthetically, there is a fourth alternative the Arbitrator believes must be considered.

The Agency's theory is that the Grievant took a Radeon 9800 box from an unsecured area, and inserted what he believed to be a new Radeon 9800 Pro video card into his home computer, which he had brought to work. Following Chief Kuheana's briefing on the morning of December 30, 2004, the Grievant panicked, and told his superiors that his wife was ill. The Grievant then went home, picked up his computer, purchased a new video card, returned to the fire station, switched video cards, and gave the video card from his computer to Chief Nowlin.

The Grievant and the Union maintain that someone else with access to the computer switched video cards. The Union points out that many of the rooms in the station are unlocked, and that the rooms are shared by two or more firefighters on different shifts. The Union argues that the Grievant knew someone had used his computer because new video games had been installed after Firefighter Shaffer reformatted the hard drive. The Union contends that this led the Grievant to the suspicion that the same person may have installed a new video card into his computer. The Union further contends that the Grievant was simply trying to make things right in purchasing a new video card, installing it in his computer, and then turning in the card he believed to be a Radeon 9800 pro card.

In their closing brief, the Union also argued that the video card in question, which was a used VTI 128 16mb card, supposedly from one of the fire station computers, could not have been the card the Grievant handed to Chief Nowlin on December 30, 2004, but was instead, a Radeon 9800 pro card.

The Union bases this argument on the testimony of firefighter Schumacher, who testified that Chief Nowlin gave him a box containing a Radeon 9800 pro video card. In this regard, the Arbitrator has carefully reviewed his notes, including the recording of Schumacher's testimony. Mr. Schumacher testified on direct that the card Chief Nowlin gave him was a Radeon 9800 pro card. However, on cross examination, Schumacher admitted that he did not see the card itself, but assumed that the card contained in the box was a Radeon 9800 pro card.

Mr. Schumacher did testify under cross-examination that at some later point, when investigators wanted to look at the box, he opened the box and observed a Radeon 9800 pro card. However, in response to a question from the Arbitrator, Schumacher acknowledged that the same box, which had been secured, was returned to Chief Nowlin. Schumacher also testified that he believed Chief Nowlin was going to turn the box over to the security force investigators.

Considering all the facts, the Arbitrator concludes that Mr. Schumacher is simply mistaken in his testimony regarding his observation that the card in the box given to him by Chief Nowlin was a Radeon 9800 pro card. First, there is an apparently unbroken chain of custody of the VTI 128 video card; the Grievant to Nowlin, Nowlin to Schumacher, Schumacher back to

Nowlin, and Nowlin to Detective Rome. The video card Rome presented at hearing was an ATI 128 video card, not a Radeon 9800 Pro card. Second, there is no dispute that only four cards were purchased, and Schumacher testified that all four cards are accounted for, three installed in computers, and one still in storage. Consequently, the Arbitrator rejects this Union argument as contrary to the facts established in the record and during the hearing.

The question that remains is whether the Grievant took a used VTI 128 video card, (perhaps thinking that it was a Radeon 9800 Pro card, since it was in the 9800 box) and installed it in his computer, converting it to his personal use. The Arbitrator concludes that the Agency has failed to prove by a preponderance of evidence that the Grievant changed the card in his computer as charged.

First, the Arbitrator doubts that the Grievant possessed the technical knowledge or expertise to swap the video cards prior to his visit to Best Buys. In this regard, the Arbitrator credits the testimony of Firefighters David Schaffer and David Kilpatrick. Both men testified that the Grievant had little or no computer skills (Kilpatrick described the Grievant, with apology, as "a computer moron"). The Arbitrator believes that the Grievant's actions were consistent with that testimony.

In particular, the Arbitrator gives great weight to David Schaffer's testimony, based on his demeanor at hearing, and his interaction with the principals as this matter was unfolding. The Arbitrator notes that Mr. Schaffer went to Chief Nowlin after hearing that the Grievant told Nowlin that he (Schaffer) had observed someone playing video games on the Grievant's computer. Schaffer corrected the record, telling Nowlin that he believed someone had installed games on the computer, but that he had not observed anyone actually using the computer. This leads the Arbitrator to believe that Schaffer truly had no ax to grind in this case, and testified truthfully at hearing regarding the Grievant's level of computer proficiency.

The Grievant and Schaffer both testified that the Grievant brought his computer into work so that Schaffer could reformat the hard drive. Schaffer testified that he carried out the reformatting, but could not complete the job because the Grievant had not brought in necessary software drivers. This behavior on the part of the Grievant is consistent with a person of limited computer knowledge. Additionally, both the Grievant and Schaffer testified

that he did not know how to load software, such as video games onto the computer. Again, this demonstrates the Grievant's lack of basic computer knowledge.

One further piece of evidence leads the Arbitrator to this conclusion; the interchange between Detective Rome and the Grievant regarding the type of card the Grievant gave to Chief Nowlin. Detective Rome testified that he had to explain repeatedly to the Grievant that the card he gave to Chief Nowlin was an ATI 128 video card, not a Radeon 9800 Pro video card. The Grievant verified Rome's testimony. Once again, the Grievant's confusion is consistent with a person who does not possess even rudimentary computer knowledge.

It is true that the Grievant testified that he changed the video card in this computer after returning it to the fire station on December 30, 2004. However, the Grievant testified that the technician at Best Buys showed him how to change the card, and that it was a matter of taking out one screw, unplugging the card, inserting the new card, and replacing the screw. Having observed others replacing various components in computers, the Arbitrator believes that it is a relatively easy task, so long as the person knows what he is doing, or someone has shown that person specifically how to replace a particular component.

Second, the Arbitrator questions why the Grievant, even if he possessed the skills to change the video cards prior to December 30, 2004, would want to do so. The Grievant testified that the computer was running slow, and that was why he brought it in for reformatting. The Grievant also testified that he had bought another computer for home use, and the old computer was intended for his son. But given the Grievant's knowledge level, the Arbitrator wonders how the Grievant would know that a new Radeon 9800 pro video card would improve the computer's graphics, or even if a new video card would be compatible with his computer.

Other facts emerged at hearing that lead the Arbitrator to conclude that, at the very least, it was possible that someone else changed the video card in the Grievant's computer. It was undisputed that others had access to the Grievant's room during the periods the Grievant was off-shift. Both Schaffer and the Grievant testified that some new video games had been installed on the computer after Schaffer reformatted it. Mr. Schaffer testified that he believed it was someone other than the Grievant who

installed the video games. Again, I credit his testimony as an impartial witness.

The Arbitrator is convinced that some else in the station had access to the Grievant's computer, and installed video games on it. That does not necessarily mean that this unknown person installed a used ATI 128 video card in the computer. The Union is correct in asserting that the Agency cannot prove that the used ATI 128 video card is government property.

Firefighter Schumacher testified that he did not take down the serial number of the used ATI 128 video card when he replaced it with the new Radeon 9800 pro video card. Schumacher also testified that there were no other identifying marks on the used card. Given that testimony, there is no way that Schumacher could identify the ATI 128 video card as the same card that came out of the Agency computer. At best, the card is similar to, or the same as, the card Schumacher put in the Radeon 9800 pro video card box, but it cannot be said with absolute certainty that it is the same card.

This leads the Arbitrator to a third possibility. It is quite possible that no one switched the video cards in the Grievant's computer, and that the ATI 128 video card the Grievant gave to Nowlin was the original card installed in his computer. Testimony at hearing established that the Agency used Dell computers that were several years old. There was no testimony regarding the make of the Grievant's computer, other than it too was several years old. It is certainly possible that both computers contained ATI 128 16mb video cards, as ATI is a major supplier of video cards in the industry.[2]

The Arbitrator is therefore left with three possibilities; that the Grievant changed the cards, and therefore is guilty of the charge; that someone else changed the cards; or that the cards were not changed at all, and the Grievant turned over the card originally installed in his computer. For the reasons explained above, the Arbitrator does not believe that the first possibility is more likely than not to be correct, and therefore finds the Agency has failed to carry their burden of proof.

Without a doubt, the Agency had good reason to suspect the Grievant of wrongdoing in this case. The Agency correctly points out that a number of the Grievant's actions were suspicious. But suspicion is not proof of guilt.

[2] ATI produced both the used 128 video card and the new Radeon 9800 Pro video card.

The Union contends that the Agency's disciplinary action was retaliation for past activities as a Shop Steward and whistleblower. The Arbitrator finds that the Union failed to produce any substantial evidence in this regard, and further finds that Kuheana and Nowlin acted on a good faith (albeit mistaken) belief that the Grievant had misappropriated government property.

Moreover, the Arbitrator recognizes that there are a number of puzzling aspects to this incident that are left unanswered. For instance, it is still unknown how or why the Radeon 9800 Pro box was in room 119. Also, there is apparently still a missing VTI 128 16mb card that was swapped out from another fire station computer. In the end, the Arbitrator must come to a decision based on the facts presented, even in the face of unresolved questions.

Lack of Candor in the Use of Sick Leave

The second charge contained in the Notice of Proposed Suspension involves what the Agency characterizes as "a lack of candor" in the use of sick leave by the Grievant on December 30, 2001. The Arbitrator finds that the Agency has shouldered their burden of proof in this charge.

The Grievant testified that he received a phone call from his wife shortly before 10:00 a.m. on December 30, 2004. According to the Grievant, his wife had undergone treatment for breast cancer, and was battling depression. The Grievant stated that he went to the VA hospital, where his wife was at work, and "counseled her". He then went home, picked up the computer, and went to a chiropractor appointment. The Grievant further testified that when he arrived at the Chiropractor's office, he was advised he was a day early. The Grievant then went to Best Buys, and then to Comp USA in an effort to buy a new Radeon 9800 Pro video card. Most significantly, the Grievant testified that it did not occur to him until he was on his way home that someone may have switched cards in his computer.

However, the Arbitrator believes the real reason the Grievant went home was because he suspected his computer contained one of the missing Radeon 9800 Pro video cards. The Arbitrator observes that the Union could have called the Grievant's wife and Chiropractor to substantiate his testimony, but for whatever reason, choose not to.

Further, the actions of the Grievant immediately following Mr. Kuheana's briefing demonstrate he was already thinking about the missing cards. It was undisputed that immediately after the briefing the Grievant told Kuheana and Chief Nowlin that he knew where the missing video cards were, and took them to the computer closet.

Even assuming the Grievant did go to the VA to counsel his wife and mistakenly went to his chiropractor, the Arbitrator finds the charge must be upheld, because the majority of the five and one half hour absence was not legitimately used for purposes relating to personal illness or dependent care.

However, the Arbitrator finds that this charge, standing alone, does not merit a nine-day suspension. The record established the Grievant was a thirty-three year veteran employee, with no prior discipline on his record. Accordingly, the single charge of Failure to be Candid in the Use of Sick Leave is modified to a letter of reprimand.

AWARD

The grievance is denied in part and sustained in part. The nine-day suspension is reduced to an official letter of Reprimand for Failure to Be Candid in the Use of Sick Leave. The charge of Unauthorized Possession of Government Property will be stricken from the letter and the Grievant's record. The Grievant will be made whole for the lost time. The Arbitrator will retain jurisdiction for a period of sixty (60) days over this matter to resolve any questions pertaining to the remedy and award.

DATE: November 29, 2005

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Arbitrator